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In The

# Supreme Court of the United States

ANGEL FIGUEROA,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

ANGEL FIGUEROA, #14503-424 Pro se
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Lisbon, Ohio 44432

## QUESTIONS PRESENTED

Did the Seventh Circuit err in failing to review the sentence of Petitioner, and 21 U.S.C. § 851 enhancement, for plain error when said sentence was based on clearly erroneous facts?

Does 21 U.S.C. § 851 enhancement provision constitute a separate element of the offense, which must be charged either in the indictment, admitted by the defendant, to be proved by a jury of one's peers?

Is due process protection violated when Petitioner was exposed to denial of counsel at both his sentencing hearing and on appeal?

Did the Seventh Circuit fail to address the Supreme Court Zedner holding, thus improperly failing to reach the merits of Petitioner's claim of a violation of the Speedy Trial Act, 18 U.S.C. § 3161(c)(1)?

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## IN THE
## SUPREME COURT OF THE UNITED STATES
## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

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## OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

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## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 14, 2010.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 4, 2010, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3161(c)(1)

18 U.S.C. § 3161(h)(8)

21 U.S.C. § 851

28 U.S.C. § 2255

Fed.R.Civ.Proc. Rule 35

Fifth Amendment

Sixth Amendment

Illinois Statutes, Chapter 720, Section 570/410(f) and (g) (1996)

## STATEMENT OF THE CASE

The Seventh Circuit Court of Appeals Denied Petitioner's Petition.

On or about 9/24/2002, Petitioner was indicted by a grand jury seated in the United States District Court, Northern District, Chicago division, case number 1:02-CR-416-3. Subsequently an information was entered on 9/10/2003 that the government intended notice to seek a 21 U.S.C. § 851 enhancement did Petitioner pursue trial on the counts against him.

On or about March 23, 2004, Petitioner was convicted by jury trial on the sole count of violating 21 U.S.C. §846, conspiracy count and not guilty of

count IV, mistrial on count II. Subsequently, Petitioner was sentenced, without the aid of counsel, on July 7, 2007, to a term of 240 months imprisonment, with an additional 3 years supervised release.

A timely pro se appeal was filed before the Seventh Circuit Court of appeals. The appeal was filed on April 17, 2007. The Seventh Circuit affirmed Petitioner's conviction on April 19, 2007, Judges Frank H. Easterbrook, Chief Judge, William J. Bauer, Circuit Judge, and Honorable Ilana Diamond Rovner, Circuit Judge presiding.

Petitioner then retained new counsel, William Mallory Kent, and submitted timely 28 U.S.C. § 2255 on October 26, 2007, raising Three Claims: 1) violation of Speedy Trial Act Right 18 U.S.C. § 3161; 2) District Court error by failing to renew its inquiry as to whether Petitioner was denied counsel at a critical stage of the proceeding against him, the sentencing proceeding; and 3) the denial of Petitioner's Right to Counsel on appeal. On May 5, 2009, the District Court denied his § 2255 Case No. 07-c-6321.

Petitioner then filed a timely appeal to the denial. The Seventh Circuit then construed his appeal as an application for Certificate of appealability, case no. 09-2197.

Then on September 14, 2010, the Seventh Circuit Court of Appeals issued its order reaffirming the denial of its own certificate of appealability (COA) for case number 09-2197. Judges Easterbrook, Bauer, and Diamond presiding.

Petitioner then filed a timely petition for rehearing en banc for reconsideration, Rules of Civil Procedure Rule 35, of its order, which was filed, on October 19, 2010. The Seventh Circuit proceeded to deny it on November 4, 2010.

## REASONS FOR GRANTING THE PETITION

In *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), the Supreme Court held "Regardless whether or not the sentence imposed is inside or out side the Guidelines Range, the appellate court must review the sentence under the abuse of discretion standard. First it must ensure that the district court committed no significant procedural error, as in when it selected a sentence based on clearly erroneous facts." *Gall*, at 450.

Here, ample information was given to the Seventh Circuit for it to ascertain whether or not 21 U.S.C. § 851 actually applied to Petitioner, which it did not. Illinois Statutes, Chapter 720, Section 570/410(f) and (g) (1996) clearly illustrate that the prior conviction relied upon by the district court, was not in fact a qualifying conviction, thus establishing Plain Error. Further this court has ruled in *Blakely*, 542 U.S. 296 (2004); *Booker*, 543 U.S. 220 (2005); and *Apprendi*, 530 U.S. 466 (2000), and the Fifth and Sixth Amendments to the United States Constitution on this issue.

In failing to even address Petitioner's challenge to his 21 U.S.C. § 851 enhancement, the Seventh

Circuit did not address what its sister circuits holdings in *United States v. Hirliman*, 503 F.3d 212, 215 (2nd Cir. 2007); *In re sealed case*, 527 F.3d 188, 193 (D.C. Cir. 2008); *United States v. Acevedo*, 219 Fed. Appx. 828, 833 (10th Cir. 2007); *United States v. Blackie*, 548 F.3d 395, 402 (6th Cir. 2008), this court failed to conduct a plain-error analysis to determine if the § 851 provision even applied to Petitioner, where he provided ample evidence it did not in fact. Further, the government never alleged or offered any rebuttal or refutation of Petitioner's evidence, which at the time was newly discovered, only compounding the error of the district court.

Petitioner offers to this court its own holding in *Gall v. United States*, 128 S.Ct. 586. The Seventh Circuit would not or could not have conducted any meaningful appellate review of Petitioner's sentence. This falls woefully short of the rights granted by the Fifth and Sixth Amendments to the U.S. Constitution and *Blakely v. Washington*, 542 U.S. 296 (2004), in which this Court determined that a defendant has the right to have any fact that enhances the potential penalties he is exposed to proven to a jury of his peers, if he did not either admit to them or have a jury of his peers find he did in fact commit.

Petitioner, further offers that in line with the Supreme Court holdings in *United States v. O'Brien*, Supreme court 08-1569, 2010 WL 2025204 (May 24, 2010) the enhancement provision relied upon by the district court, 21 U.S.C. § 851, is an element of the offense, because it itself is a separate charged count

which doubled Petitioner's sentence, in effect also triggering the Due Process Clause of the Sixth Amendment, as well as *Blakely*.

To identify clear error, as defined by the Supreme Court in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), we must ask if fundamental rights were denied Petitioner, which resulted in a fundamental miscarriage of justice or improper application of inapplicable law, which Petitioner asserts it does in fact.

As to the question of right to counsel at a critical stage in the proceeding, Petitioner offers that not only was the opinion of the Seventh Circuit devoid of even the minimal standard set forth by the Honorable Court in *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), but it is devoid of a cognizable squaring of the facts of this case. The Petitioner in this case has a minimal understanding of the procedure set forth in the Rules of Criminal Procedure, even less so at the time when the manifest miscarriage of justice occurred. The Seventh Circuit implies that because the petitioner said he had a Sixth Amendment Right to be represented by counsel, that somehow implied knowledge of the facts and issues pertinent to a proper defense. Petitioner never waived, either in writing or orally before the district court, his right to counsel. To the contrary, at his sentencing, he again requested counsel, but the district court instead proceeded to sentence him.

The Court in *Gideon v. Wainright*, 372 U.S. 335, 339-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), established a test of whether a criminal defendant intelligently and competently waives his right to counsel. See also *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970).

When *United States v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), is viewed in its proper context, one can only conclude that Petitioner, despite protestations by himself, was forced to stand alone against the State, thus depriving him the opportunity to be fairly and competently omitted. Thus all procedural and factual issues, such as the misapplication of 21 U.S.C. § 851 flow outward from this manifesting clear error and requiring at a minimum a fair and full resentencing. The Seventh Circuit essentially presumed that a waiver of right to counsel was present from a silent record, in violation of *Burgett v. Texas*, 389 U.S. 109, 114-15, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967) and contrary to its own holding cited in *Jackson v. Miller*, 260 F.3d 769, 775 (7th Cir. 2001).

The Seventh Circuit, in its Order of July 7, 2007, completely ignored the Court's holding in *Zedner v. United States*, 126 S.Ct. 1976 (2006) which it stated the Speedy Trial Act (STA) of 1974 generally requires a federal criminal a trial to begin within 70 days after a defendant is charged or makes an initial appearance 18 U.S.C. § 3161(c)(1). Although Section 3161(h)(8) permits a district court to grant a continuance and

exclude the resulting delay if it makes on-the-record findings that the ends of justice served by granting the continuance outweighs the public's and defendant's interest in a speedy trial. Here, Petitioner did not even receive an opinion which even reached the merits of his claims. The Seventh Circuit merely concluded that Petitioner failed to raise his speedy trial claim in a timely manner. Petitioner offered ample evidence and proof that the District court failed to properly make express on the record findings to properly exclude numerous time periods of well in excess of the 70 days allotted in the STA.

The Seventh Circuit ignored precedent and the STA itself which concludes that non-excludable periods in excess of 70 days required dismissal of the indictment. Had the Court addressed the merits of Petitioner's claims, this Court would have more than passing references to the Act, which this Court in *Zedner*, held are not acceptable. The record is devoid of any reasons, either in writing or orally, for excluding periods which far outnumber 70 days. Petitioner offers this Court has sufficient grounds, based upon its own precedent, to grant Certiorari in the foregoing case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

**NONPRECEDENTIAL DISPOSITION**
To be cited only in accordance with
Fed. R. App. P. 32.1

**United States Court of Appeals**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

Submitted June 3, 2010*
Decided September 14, 2010

**Before**

FRANK H. EASTERBROOK, *Chief Judge*

WILLIAM J. BAUER, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 09-2197

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee*,<br>*v.*<br>ANGEL FIGUEROA,<br>*Defendant-Appellant*. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.<br>No. 07 C 6321<br>Wayne R. Anderson, *Judge*. |

* This appeal is successive to case no. 06-3022 and has been submitted to this panel under Operating Procedure 6(b). After examining the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* FED. R. APP. P. 34(a)(2).

## ORDER

Angel Figueroa appeals from the district court's denial of his petition for collateral relief under 28 U.S.C. § 2255. The petition raises several challenges to his convictions and sentence, and we granted a certificate of appealability to resolve one of them: whether the district court adequately informed Figueroa of his right to counsel. We now affirm the district court's judgment.

Federal officers caught Figueroa trying to purchase heroin from a drug courier. Although Figueroa did not request assistance under the Criminal Justice Act, he received temporary representation from a federal defender at his initial appearance. The minute order reflecting his initial appearance notes in summary fashion that "defendant was informed of his rights." Figueroa retained counsel within a week of his arrest but replaced her less than a year later. It was with his second retained attorney that Figueroa proceeded to trial, where he was found guilty of the drug conspiracy.

Figueroa fired his trial counsel shortly after the verdict. Sentencing was delayed over two years as the court allowed Figueroa to retain and fire a succession of five more lawyers. Figuero understood his right to counsel, stating in writing to the court that he "has a Sixth Amendment Right to be represented by counsel at all critical stages of the defense." The court also advised him that he had the right to represent himself. Figueroa refused to attend the hearing on his

final lawyer's motion to withdraw, so the district court locked in a date for sentencing and told the withdrawing lawyer to inform Figueroa that the date was firm and that he or a retained lawyer of his choice should plan to attend.

Figueroa appeared pro se at sentencing. The district court imposed a term of 240 months' imprisonment, the mandatory minimum. After announcing the sentence the court asked Figueroa if he wanted court-appointed counsel for appeal. Not wanting to spend more money on legal fees, Figueroa claimed that he did. The court offered to move quickly so that an attorney could "spring into action."

Despite the court's offer and Figueroa's professed desire for appointed counsel, he filed a timely notice of appeal pro se. Before briefing commenced we issued an order asking whether Figueroa wished to proceed on appeal without counsel or request an appointed attorney. His response was unequivocal: "It is the position of Appellant that he can perfect his appeal without counsel in this matter. As such, no request for appointment of counsel will be presented to the court for consideration." On direct appeal Figueroa's arguments focused on his right under the Speedy Trial Act to a timely indictment and trial; he did not raise an argument concerning his right-to-counsel. In his current petition, he contends he was denied his right to a timely indictment, his right to counsel at sentencing, and his right to counsel on appeal. The certificate of appealability limits our

review to the question whether the district court adequately informed Figueroa of his right to counsel.

The record shows by Figueroa's conduct and words that he understood his right to counsel. Indeed, Figueroa squeezed all he could from the right, delaying his sentencing for two years while he cycled through private attorneys. When at last the court set a firm date for sentencing and presented him with two choices – hiring a lawyer or proceeding pro se – he chose the second, an implicit waiver of the first. *See United States v. Alden*, 527 F.3d 653, 660 (7th Cir. 2008); *United States v. Oreye*, 263 F.3d 669, 670 (7th Cir. 2001). True, the district court did not mention at the hearing before sentencing the familiar third option, that Figueroa may be entitled to an appointed lawyer, but Figueroa made no claim of indigency after over two years of retaining private attorneys. In any case, the minute order from Figueroa's initial appearance, during which appointed counsel actually represented him, states that he was "informed of his rights." We understand this to mean, based on the federal rules governing initial appearances, that he was informed of his right to request that counsel be appointed. FED. R. CRIM. P. 5(d)(1)(B). Therefore, we are satisfied that the court discharged its duty to inform Figueroa of his right to appointed counsel.

Figueroa also renews his argument that he was denied assistance of counsel on appeal when the district court failed to appoint a lawyer for his direct appeal. We interpret this argument as an implicit request to expand the certificate of appealability, which

was limited to whether the district court adequately informed Figueroa about his right to counsel. We will amend a certificate of appealability only on a substantial showing of the denial of a constitutional right. *See Ouska v. Cahill-Masching*, 246 F.3d 1036, 1045 (7th Cir. 2001). Of course, Figueroa had a constitutional right to counsel on direct appeal, *see Evitts v. Lucey*, 469 U.S. 387, 402 (1985). And the district court neglected to appoint a lawyer for his direct appeal after Figueroa requested one. But before briefing proceeded on direct appeal, and therefore before the neglect could harm Figueroa, we gave him the option of requesting counsel. He elected to proceed pro se, thereby intentionally abandoning his right to counsel. Because of this express waiver, and because the constitutional right of self-representation at trial has no analog on appeal, *see Martinez v. Court of Appeals of California, Fourth Appellate Dist.*, 528 U.S. 152, 160-61 (2000), we decline to expand the certificate of appealability.

AFFIRMED.

## APPENDIX B

## UNITED STATES DISTRICT COURT
## NORTHERN DISTRICT OF ILLINOIS
## EASTERN DIVISION

| | | |
|---|---|---|
| ANGEL FIGUEROA, Petitioner, | ) | No. 07 C 6321 |
| v. | ) | Wayne R. Andersen |
| UNITED STATES OF AMERICA, Respondent. | ) | District Judge |

### MEMORANDUM OPINION AND ORDER

This case is before the court on the petition of Angel Figueroa, as a prisoner in federal custody, to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the court denies the petition.

### BACKGROUND

On April 30, 2002, Angel Figueroa was arrested and charged by complaint with conspiring to distribute heroin. At his initial appearance later that day, Figueroa was detained pending trial. On May 24, 2002, the government filed a Motion for Extension of Time in Which to Return Indictment ("First Motion"). Acting Chief Judge Charles P. Kocoras granted the First Motion on May 29, 2002, extending the time to file an indictment to July 30, 2002 ("First Order").

Figueroa was released on bond on July 18, 2002. The government filed a Second Motion for Extension of Time in Which to Return Indictment ("Second Motion") on July 26, 2002. Acting Chief Judge Ruben Castillo granted the Second Motion on July 27, 2002, extending the time to file an indictment to September 30, 2002 ("Second Order").

On September 24, 2002, the grand jury charged Figueroa in a three-count indictment: one count of conspiring to distribute heroin, one count of possessing heroin with intent to distribute, and one count of possessing firearms in furtherance of a drug trafficking crime. A jury trial was held on these charges. The trial commenced on March 15, 2004, and ended on March 23, 2004. The jury could not reach a verdict on the possession with intent to distribute charge and found Figueroa not guilty on the firearms charge. However, Figueroa was convicted of conspiring to distribute heroin. On July 7, 2006, Figueroa was sentenced to 240 months imprisonment and five years supervised release.

Figueroa subsequently appealed his conviction to the Seventh Circuit on April 17, 2007. In his direct appeal, Figueroa argued for the first time that his indictment should have been dismissed pursuant to the Speedy Trial Act because it was not filed within thirty days from the date upon which he was charged by complaint. *United States v. Figueroa*, 228 Fed. Appx. 611, 612 (7th Cir. 2007). Further, he claimed his right to a speedy trial was violated because he

was not tried within 70 days of his indictment. *Id.* The Speedy Trial Act provides in relevant part:

> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.
>
> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

18 U.S.C. §§ 3161(b)-(c)(1). The Seventh Circuit held that Figueroa waived his rights under the Speedy Trial Act because he did not move to dismiss the indictment before trial and found his contention that he could not have acted before trial because he was not aware of the purported statutory violations to be

frivolous. *Figueroa*, 228 Fed. Appx. at 612. Accordingly, the Seventh Circuit denied Figueroa's appeal and affirmed the district court's judgment on April 19, 2007. *Id.* at 613.

On November 7, 2007, Figueroa filed the instant petition for relief under 28 U.S.C. § 2255, claiming: 1) his judgment and sentence must be vacated because his speedy trial right to a timely indictment was violated; 2) Figueroa is entitled to a *de novo* resentencing and hearing on his motion to dismiss for speedy indictment purposes because the district court failed to renew its inquiry whether Figueroa desired counsel at his sentencing proceeding; 3) Figueroa is entitled to a *de novo* appeal because Figueroa was denied his right to counsel on appeal. On December 4, 2007, government filed a response to Figueroa's motion. At Figueroa's request, the government filed an agreed motion to disclose the First Order on May 28, 2008. On May 30, 2008, this court granted the agreed motion. After gaining access to the First Order, Figueroa filed a reply to the government's response to his habeas petition, arguing for the first time that Acting Chief Judge Kocoras's First Order extending the time to return the indictment was "legally insufficient" and that Figueroa's trial counsel was ineffective because he failed to challenge the validity of the First Order.

## STANDARD OF REVIEW

Collateral relief under 28 U.S.C. § 2255, the federal habeas corpus statute, is available only in limited circumstances. The statute provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255. Relief, therefore, is limited to "an error of law that is jurisdictional, constitutional, or constitutes a 'fundamental defect which inherently results in a complete miscarriage of justice.'" *Bischel v. United States*, 32 F.3d 259, 263 (7th Cir. 1994) (quoting *Borre v. United States*, 940 F.2d 215, 217 (7th Cir. 1991)).

## DISCUSSION

Figueroa now alleges that he is entitled to habeas corpus relief on three grounds. Count I alleges that his judgment and sentence must be vacated because his speedy trial right to a timely indictment was violated. Within this claim, he also alleges that his

counsel was ineffective for failing to object to the First Motion and for choosing not to move to dismiss the indictment under the Speedy Trial Act. In Count II, Figueroa claims that he is entitled to a *de novo* resentencing and hearing on his motion to dismiss for speedy indictment purposes because the district court failed to renew its inquiry as to whether Figueroa desired counsel at his sentencing proceeding. Finally, Count III claims that he is entitled to a *de novo* appeal because Figueroa was denied his right to counsel on appeal.

## I. Count I: Speedy Trial Act Violation

### A. Substantive Claim is Procedurally Barred

Figueroa's first claim alleges that his right to a speedy trial under the Speedy Trial Act was violated. His grounds for this claim were that he was not indicted within 30 days from his arrest and that he was not tried within 70 days from his indictment. Figueroa also raised this argument on direct appeal and the Seventh Circuit found that Figueroa's claim regarding the indicment failed because he "waived his rights under the Speedy Trial Act" by not moving "to dismiss his indictment before trial." *Figueroa*, 228 Fed. Appx. at 612. In addition, the court found "Figueroa's contention that he could not have acted before trial because he was not aware" of the purported Speedy Trial Act violations to be "frivolous." *Id.*

The Seventh Circuit also rejected Figueroa's claim that the delay before his trial constituted a violation of his *Sixth Amendment* right to a speedy trial. The Court employed the four factor test set forth in *Barker v. Wingo* to assess Figueroa's constitutional claim. *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (setting forth the four factors as: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."). The Court then found that "there was no constitutional violation in this case" and that no tangible prejudice resulted from the delays. *Figueroa*, 228 Fed. Appx. at 613.

Because Figueroa's Speedy Trial Act claims have been argued and denied at the appellate level, Figueroa cannot validly raise a claim for a violation of his rights under the Speedy Trial Act in his habeas petition. Therefore, Figueroa's Speedy Trial Act claim is procedurally barred. *See, e.g., United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995) (holding that a claim raised on direct appeal cannot be raised again in a habeas challenge).

### B. Ineffective Assistance of Counsel

Figueroa's habeas petition includes an additional argument under his Speedy Trial Act violation claim which alleges for the first time that Figueroa's counsel was ineffective for failing to object to the First Motion and for choosing not to move to dismiss the indictment under the Speedy Trial Act. This argument lacks merit. In order to state a claim under the

*Strickland v. Washington* test, one must satisfy its two prongs – ineffectiveness of counsel and prejudice resulting from the ineffectiveness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The first prong, the ineffectiveness of counsel prong, reviews whether counsel's defense satisfies the standard of "reasonably effective assistance." *Id.* To fulfill this prong, the petitioner must affirmatively show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court must defer highly to counsel because it is far too easy, in hindsight after the petitioner has lost his case, to find that counsel's lack of success fell below the level of representation required by counsel to provide. *Id.* at 689. The petitioner must show clear evidence, in the form of specific acts or omissions, to surpass this presumption. *Id.* at 689-90. The court must examine the facts that the petitioner submits from the perspective of counsel at the time of the conduct alleged to be inadequate. *Id.* at 689.

The second prong, the prejudice prong, reviews whether counsel's act or omission had an unfavorable effect on the defense. *Id.* at 692. This prong protects against the scenario in which counsel may have acted unreasonably but the unreasonable act or omission did not prejudice the petitioner's defense. *Id.* at 691-92. To satisfy this prong, the petitioner must affirmatively show the prejudice that resulted, and must also show that there is a "reasonable probability" that his attorney's acts or omissions altered the outcome. *Id.* at 693-94. The court should make this determination

while considering the totality of the evidence. *Id.* at 695.

Figueroa is unable to satisfy either prong of the *Strickland* test. With respect to the performance prong, Figueroa "bears a heavy burden when attempting to establish that his counsel was ineffective." *United States v. Donaldson*, 978 F.2d 381, 394 (7th Cir. 1992). We find that Figueroa's attorneys' actions have met an objective standard of reasonableness. In reviewing Figueroa's counsel's pre-trial behavior, we find that Ms. O'Daniel's decision not to object to the First Motion was proper because it was in Figueroa's best interest at the time since he was then cooperating with the government.

Similarly, we also find that Figueroa's trial counsel, Mr. Diamond-Falk, was not deficient. It is clear that Mr. Diamond-Falk had reasonable grounds for not questioning Ms. O'Daniel's prior actions. In fact, he had every reason to believe, based on precedent, that even if the court dismissed the indictment, it would be dismissed without prejudice, and the government would have been able to re-indict Figueroa.

In order to satisfy the second prong under the *Strickland* test, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. In the present case, this Court finds no prejudice resulting from Figueroa's attorneys' decisions not to object to the First Motion or move to dismiss the indictment. Figueroa was cooperating

with the government during the time of the First Motion and later ceased cooperating. If Figueroa's ultimate intentions of non-cooperation had been communicated to the government in a timely manner, then the government could have, and likely would have, indicted Figueroa within the thirty-day limit.

Similarly, Figueroa fails to show that his trial counsel's decision not to move to dismiss the indictment under the Speedy Trial Act resulted in prejudice to him. Judge Kocoras' rationale for granting the First Motion was simply to give the parties additional time to reach an agreement. Therefore, given this objective, it is unlikely that Figueroa would have prevailed on a motion to dismiss the indictment based on a Speedy Trial Act violation claim.

Finally, Figueroa has failed to prove that there exists a reasonable probability that this court would have dismissed the complaint or indictment with prejudice, even if he had succeeded on his Speedy Trial Act claim. Given the seriousness of Figueroa's offense and his own role in causing the delay in returning the indictment, it is highly improbable that the court would have dismissed his complaint or indictment with prejudice. If the court had elected to dismiss the indictment without prejudice, the government could then have re-indicted Figueroa, and this case would have concluded with the same verdict. Based on these reasons, this Court finds no showing of *Strickland* prejudice. Accordingly, Figueroa's petition for habeas relief is denied as to Count I.

## II. Count II: *De Novo* Resentencing and Hearing on Motion to Dismiss

Figueroa's second claim alleges that he is entitled to a *de novo* resentencing and hearing because the district court failed to renew its inquiry as to whether Figueroa desired counsel at his sentencing proceeding. The law makes clear that a § 2255 motion is "neither a recapitulation of nor a substitute for a direct appeal." *Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992). Figueroa waived his right to an attorney for his motion to dismiss and at sentencing by failing to raise the issue of such legal representation on direct appeal. In addition, Figueroa has, at various stages of this case, been represented by a number of competent attorneys including: Ms. Catharine O'Daniel, Mr. Nathan Diamond-Falk, Ms. Andrea Gambino, and Mr. Michael Leonard. During the span of this case, Figueroa has decided to fire all four of these lawyers. Because the court has ensured on multiple occasions that Figueroa had access to counsel, and it has been Figueroa's persistent termination of his counsel that has resulted in his intermittent *pro se* status, we believe we were justified in having proceeded with Figueroa's sentencing and hearing on his motion to dismiss *pro se*. Accordingly, Figueroa is not entitled to habeas relief based upon Count II of his petition.

### III. Count III: *De Novo* Appeal

Figueroa's third claim alleges that he is entitled to a *de novo* appeal because he was denied his right to counsel on appeal. Although Figueroa did make a request for appellate counsel during his sentencing, if counsel was not appointed as he anticipated, he should have filed a motion for appointment of counsel, which he failed to do. Furthermore, Figueroa did not express his desire for appellate counsel in his *pro se* appellate filings. Given the court's abovementioned persistence in appointing counsel for Figueroa and Figueroa's continual changes to his representation, we conclude that Figueroa knew the proper procedures for appointment of counsel and chose to proceed *pro se*. He cannot now use this argument to succeed on his habeas petition. Therefore, Figueroa's petition for habeas corpus is denied as to Count III.

## CONCLUSION

For the foregoing reasons, Angel Figueroa's petition to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is denied, terminating this case. Additionally, all pending motions [10,11, 12] are denied as moot. This is a final and appealable order.

It is so ordered.

/s/ Wayne Andersen
Wayne R. Andersen
United States District Judge

Dated: February 9, 2009

## APPENDIX C

**United States Court of Appeals**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

Decided August 20, 2009

**Before**

MICHAEL S. KANNE, *Judge*

No. 09-2197

ANGEL FIGUEROA,
*Petitioner-Appellant,*
*v.*
UNITED STATES OF AMERICA,
*Respondent-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 07 C 6321
Wayne R. Anderson, *Judge.*

### ORDER

Angel Figueroa has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We conclude that Figueroa has made a substantial showing of the denial of a constitutional right as to whether the district court adequately informed him of his right to counsel. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is GRANTED. Briefing in this case shall proceed as follows:

1. The brief and required short appendix of the appellant are due by November 2, 2009.

2. The brief of the appellee is due by December 1, 2009.

3. The reply brief of the appellant, if any, is due by December 15, 2009.

Should Figueroa request counsel for his appeal, he must also file a motion establishing his inability to pay counsel's fee.

Note: Circuit Rule 31(e) (amended Dec. 1, 2001) requires that counsel tender a digital copy of a brief, from cover to conclusion, at the time the paper copies are tendered for filing. The file must be a text-based PDF (portable document format), which contains the entire brief from cover to conclusion. Graphic-based scanned PDF images do not comply with this rule and will not be accepted by the clerk.

Rule 26(c), Fed. R. App. P., which allows three additional days after service by mail, does not apply when the due dates for briefs are specifically set by order of this court. All briefs are due by the dates ordered.

Important Scheduling Notice !

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly

after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http://www.ca7.uscourts.gov/cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

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## APPENDIX D

**United States Court of Appeals**
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 4, 2010

**Before**

FRANK H. EASTERBROOK, *Chief Judge*

WILLIAM J. BAUER, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 09-2197

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee*,<br>*v.*<br>ANGEL FIGUEROA,<br>*Defendant-Appellant*. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.<br>No. 07 C 6321<br>Wayne R. Anderson, *Judge*. |

### ORDER

No judge of the court having called for a vote on the Petition For Rehearing En Banc filed by Defendant-Appellant on October 19, 2010, and all of the judges on the original panel having voted to deny the same,

**IT IS HEREBY ORDERED** that the Petition for Rehearing En Banc is **DENIED**.